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Was it a fair trial?

[Chicago?]

[1888?]

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WAS IT A FAIR TRIAL

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AN APPEAL TO THE GOVERNOR OF IL

BY

GEN. M. M. TR

IN BEHALF OF
ANARCH

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Box 691

WAS IT A FAIR TRIAL?

AN APPEAL TO THE GOVERNOR OF ILLINOIS, BY GEN. M. M. TRUMBULL.

APR 27 1945

Seven men are now lying under sentence of death in Chicago, nominally for murder, but really for sedition, out of which it is alleged the murder grew. It is averred by friends, and believed by many enemies of the condemned men, that their trial was unfair, the rulings of the court illegal, and the sentence unjust. The decision of the Supreme Court ends the trial of the Anarchists, but not the trial of the judgment.

These men are sentenced to die on the 11th day of November. In the gloom of this impending tragedy, the Governor of Illinois rises into unparalelled importance as the highest court of appeal. He is called upon to say whether the sentence is the decree of justice, or a judicial mandate of revenge. Shall the "Revenge" circular of May 4th be answered by another "Revenge" circular in the shape of a judicial opinion? Shall the law of the land be driven from the Court House by the law of retaliation? The Governor must decide.

We appeal to the Governor or clemency in this case on the grounds of magnanimity and mercy, but not on them alone. We appeal to him that he arrest this revengeful judgment, because the record shows that none of the condemned were fairly proven guilty, while some of them were fairly proven innocent; not innocent of sedition, and inflammatory speech, but innocent of murder.

It has been contended that the authority of the Governor over a judicial sentence is the prerogative of mercy alone; and that all questions of guilt

or innocence, of justice or injustice, have been settled by the decision of the Supreme Court. This is a mistake. The power to pardon is frequently judicial, although the form of its exercise is not. It is true that the Governor does not reverse or modify the judgments of the courts, except in the form of clemency, yet the power to pardon is continually exercised as a judicial function vested in the chief magistrate. It has been so from the earliest times in England, and there, as here, under the form of mercy, errors of the courts are constantly corrected by the pardoning power. The case of John Frost will serve as an example:

In 1839, Frost, Williams and Jones, were tried in Wales for high treason. They had levied war against the Government. They had led a mob of men to attack the jail at Monmouth, and they had engaged in battle with the police and soldiers. As a consequence of this mad enterprise fifty men were killed. There was no question about the guilt of the accused, and they were duly sentenced to death. After the trial was over, it was claimed by their counsel that the list of witnesses for the Crown had not been handed to the prisoners the legal number of days before the trial. This point was assigned for error, and it was referred to the fifteen judges sitting in Westminster Hall. Their answer was:

"1st. A majority of the judges in the proportion of nine to six are of opinion that the delivery of the list of witnesses was not a good delivery in point of law,

But, Secondly. A majority of the judges in the proportion of nine to six are of opinion that the objection to the delivery of the list of witnesses was not taken in due time."

So the judgment was affirmed; but the Government said that it would never do to hang three men, however guilty, who, at their trial, were deprived of any right to which they were entitled by the law, although the prisoners themselves had waived it by not asking for it. The judges having confessed that there was error in the trial, it would be a scandal that the men should suffer death. The sentence was, therefore, commuted to transportation for life. In the Frost case the commutation of the sentence was a judicial act exercised in the form of clemency under the pardoning power.

ERRORS IN THE RECORD.

In the present case the Supreme Court of Illinois confesses errors in the record, and, as in the Frost case, decides as to some of them that objection to them was not made in time. For instance, in the matter of the Most letter, the language of the court is this:

"The objection that the letter was obtained from the defendant by an unlawful siezure is made for the first time in this court. It was not made on the trial in the court below."

As a technical rule of practice this may be correct, and, perhaps, binding on the Supreme Court, but it is not binding on the Governor, as the like decision in Frost's case was not binding on the Crown. Technicalities in favor of life should be liberally allowed, and this is a maxim of the law. Technicalities in favor of death have a ghastly look; they are altogether shocking, and they are odious in the law.

In the deepest tragedy there are scenes of comedy. So in this. Scarcely had the Supreme Court handed the seven men to the Lord High Executioner when up steps Mr. Justice Mulkey, a member of the Court, and with comic paradox passes mortal judgment upon the decision itself. The stab he gives it is fatal. Here is what he says:

"It is not my intention to offer a separate opinion, as I should have done. I desire to avail myself of this occasion to say that, while I concur in the conclusions reached, and also in the general views as entered in the opinion filed, I do not wish to be understood as holding that the record is free from error, for I do not think it is."

Which is to say, that Mr. Justice Mulkey agrees to the *conclusions*, but not to the premises on which they are founded. He agrees to the *general* views but not to the special reasons. He is neither ethical nor logical, for if the premises are bad, the conclusion must be, at least, dubious. If the special reasons are unsound the general views resulting from them cannot sanctify the hanging of seven men. Judge Mulkey's concurrence in death for the Anarchists on general principles is but a judicial echo of the angry clamor of the streets. "They didn't have a fair show," said the president of a vigilance committee, in excuse for the hanging of a gang of bad characters, "but most of 'em was guilty." The apology was weak.

Judge Mulkey thinks that he can sanction the decision, and at the same time sustain his reputation as a lawyer, by disclaiming all responsibitity for its errors. He knows that the decision becomes authority in Illinois, and that it will be enbalmed in the "Reports." He sustains the decision, barring the errors in it. When the passions of this hour are gone, when the seven men are silent in the grave, when the bar of Illinois is laughing at the decision as a legal statement, Judge Mulkey reserves the right to say, "I told you so at the time; I said then that errors were in the record; these that you ridicule are the errors that I meant." This resource cannot

avail him, because he is not brave enough to expose in a separate opinion the errors he confesses. Chief Justice Pilate confessed that there were errors in the trial, and even washed his hands of the judgment, but the stain remains for ever. Mr. Justice Mulkey consents to the death of seven men under a judgment which, although legally defective and infirm, is good enough for them. The intimation of Mr. Justice Mulkey that he has a dissenting opinion in his mind, which he declines to spread upon the record, is of itself a full justification for interference by the Governor of the State.

THE ODDS AGAINST THE PRISONERS.

In the trial of the Anarchists the law itself was bent and strained to the breaking point. On the floor of the Court House they stood at a perilous disadvantage. The scales of justice were not poised evenly between the accused and the State. They were poor; the prosecution rich. The whole machinery of the city and county government was at the service of the prosecution. The treasury was reckless of cost. The police force, the detective force, and every official influence were active against the prisoners. They were beaten from the start. In the arena of life or death they fought against odds unfair and invincible. They played for a jury with dice loaded against them. The indictment was a bewildering contradiction of sixty-nine discordant counts, and every count was the horn of a dilemma. If Schnaubelt threw the bomb, says the Supreme Court, you are guilty as his accomplices, because the indictment alleges that Schnaubelt threw it. If Schnaubelt did not throw the bomb, as you have tried to show, then the case of the State is proved, because the indictment says that it was not thrown by him, but by an unknown person. The exact language of the Court is this:

> "All the proof introduced by the defendants thus tending to show that Schnaubelt did not throw the bomb tended also to prove that an unknown person threw it."

From a dilemma like that escape is hopeless. Evidence and its contradiction are alike fatal to the accused. From a labyrinth of sixty-nine counts the most experienced pilot cannot extricate the prisoners. There is not a guide either in legal or moral philosophy that can show the way out. On this subject the rebuke of Lord Chief Justice Denman, in delivering judgment in the O'Connell case, may be quoted with approbation. He said:

> "I must take the liberty to throw out an observation that, in my opinion, there cannot be a much greater grievance or oppression than these endless, voluminous and unintelligible indictments. The indictment which fills fifty-seven folio pages is an abuse to be put down, not a practice to be encouraged."

In the O'Connell case there were eight defendants, as in the Anarchist case, and they also were imprisoned in the convolutions and sinuosities of an indictment with many counts, "endless, voluminous and unintelligible." The indictment which drew from Lord Denman that indignant criticism contained only eleven counts, while that against the Anarchists contained sixty-nine. This is a six-fold greater "grievance and oppression" than the indictment in the O'Connell case, and the wrong is multiplied a thousand fold when we remember that the Anarchists were on trial for their lives, while in the O'Connell case the offense charged was only a misdemeanor punishable by imprisonment and fine.

THE WRONG OF REFUSING SEPARATE TRIALS.

As if the tortuosities of the indictment were not sufficiently complicated, they were again multiplied by eight when the court refused a separate trial to each of the defendants. There is not another State trial in the history of political prosecutions where eight men were tried together for their lives on an indictment containing sixty-nine counts. There is not an enlightened nation on the globe that would permit it, and if such a trial can legally hang a man in Illinois, her civilization needs hurrying up. Will the Governor permit this "grievance and oppression" to prevail; he alone can save the character of the State from the frenzy of the law. We ask the Governor for clemency, and we base our petition on the right of every man to a fair an impartial trial.

The Supreme Court decides that the matter of separate trials is within the discretion of the court below, to allow them or deny them. True, but this is a judicial discretion, not an arbitrary power; a discretion subject to be reviewed by the Supreme Court, and corrected wherever its exercise has been oppressive or unjust. It is a discretion that may be reviewed by the Governor of the State, when by its operation the lives of seven men are placed in jeopardy. The joinder of the defendants made the testimony against each avail against all. It practically deprived them of the benefit of each other's testimony; it embarrassed them at every step of the trial, and it confused the jury, who never even tried to sift the evidence or apply it. In

hopeless bewilderment they contented themselves with a hurried verdict of guilty "as charged in the indictment," an indictment which alleged the killing of Degan in sixty-nine different ways. They never read the indictment, for they were not out long enough to do so.

By trying the defendants all together, nearly every piece of evidence against them separately was multiplied by eight. For instance, a public speech made by Parsons in February, 1885, is made evidence against Fielden and six other men on trial for a murder committed in May, 1886. So, a public speech made by Fielden in March, 1885, is made evidence against Parsons and six others in the same way. Old editorial articles by Spies were made evidence against Parsons and the other six, while editorials by Parsons were transmuted into testimony against Spies. The defendants were weighted down with hundreds of criminations, which, having reference to only one of them, were made to bear upon them all. Says the Court:

"Spies, Schwab, Parsons and Engel were responsible for the articles written and published by them as above shown. Spies, Schwab, Fielden, Parsons and Engel were responsible for the speeches made by them respectively."

Here Fielden, whose name appears not in the first sentence, is ingeniously woven into the mixture of writing, publishing and speaking, although he never wrote or published anything.

If it is pretended that the jury applied the evidence to the defendants "*respectively*," the proof is absolutely conclusive that they did not. It was impossible for them to do so in the short time occupied by them in deliberation. In that short time they could not have reviewed, compared or applied the evidence either to the counts in the indictment, or to the defendants "respectively."

The Supreme Court itself was compelled to recognize the illegal character of the testimony above described, although in an apologetic way. The confession and apology of the court is in these words:

"Declarations that are merely narrative of what has been done or may be done, are incompetent, and should not be admitted except as against the defendant making them, or in whose presence they are made. The utterances of the defendant Spies, whether in his paper, his speeches or his conversation, were in furtherance of the purposes and objects of the conspiracy in which he was engaged. If testimony as to expressions used by him, that are not of the character here indicated, has *crept into the record*, it is so inconsiderable that it could not in any way have injured the other defendants."

Unfortunately a great deal of testimony "not of the character indicated" was admitted, not only against the defendant making them, but against all the others. It is a violent assumption that it could not have injured the others when it is remembered that the jury did not attempt to sift the evidence and attach each piece of it to the particular defendant implicated by it. Other errors are mildly rebuked for having "crept" into the record. They did not creep in. They were crowded in against the protest of the defendants and to their serious injury. By trying eight men together on an indictment of sixty-nine counts, the door was thrown wide open, and errors did not have occasion to creep in. They were invited in and welcomed. The court reasons as if the defendants insisted on a joint trial, and are therefore responsible for the illegal consequences. The prosecution is responsible, not the prisoners.

The arbitrary joinder of the defendants virtually deprived them of the benefit of each other's testimony. This is not contradicted by saying that they were offered as witnesses and allowed to testify. Their testimony was discredited by the jury, and the Supreme Court intimates that the jurors were justified in disregarding it, because the men were on trial for their lives, and therefore interested enough to speak falsely. Thus in referring to Fielden's testimony the court says:

"It was for the jury to determine whether he told the truth or not. They had a right to consider that he was on trial for murder."

All through the argument in the trial below, the jury were urged by counsel for the State to disbelieve the testimony of the defendants, because they were on trial. Here again the prosecution takes advantage of its own wrong. Having joined the defendants in the trial against their earnest protest, the State urges its own wrong doing as a reason for disbelieving them. Had they been separately tried, this reason would not have existed except as to the value of each man's testimony for himself. Each man not on trial would have been a credible witness for the others. At all events, it could not have been objected to his testimony that he was on trial for his life.

UNFAIR TACTICS OF THE STATE'S ATTORNEY.

The course pursued by the counsel for the State was unfair throughout the trial. A few examples of the strategy and tactics they employed will prove this accusation. They were permitted to imitate Mark Antony when he inflamed the passions of the Roman populace by pointing them to

"Cæsar's vesture wounded." They were permitted to show the jury not only the wounded vesture of Matthias Degan, but also that of several other men whose names were not in the indictment at all. They were permitted to call the attention of the jury to the blood upon the vesture after the style of Antony, when he said:

> "See what a rent the envious Casca made,
> Through this, the well-beloved Brutus stabbed,
> And as he plucked his cursed steel away,
> Mark how the blood of Cæsar followed it."

The artful stump speech of Antony was perfectly legitimate. It was not made in a judicial proceeding, but in a political contest. He was of the opposite party to that of Brutus. The struggle between them was for the possession of the offices and the control of the government; but had Antony been State's Attorney, prosecuting Brutus and Cassius under an indictment for the murder of Cæsar, the Roman judges would not have allowed him to practice before a jury in the Court House the methods he employed in the streets before a mob. The object of Antony in Cæsar's case, and of the counsel for the people in Degan's case, were alike to excite feelings of anger and revenge in the men they were talking to, the jury in the one case, the mob in the other. There was no dispute whatever about the manner of Degan's death, and therefore the exposure of his wounded vesture to the jury was useless and superfluous, except as an appeal for vengeance. The Supreme Court, unwilling to sanction such a method, finds a weak excuse for it, and mildly rebukes it, thus:

"The articles in question were presented in the condition in which they were left after being exposed to the force of an exploding bomb, for the purpose of showing the power of dynamite as an explosive substance. While this kind of testimony may not have been very material, we cannot see that it was to such an extent incompetent as to justify a reversal."

No, it is not pretended that every error is enough of itself to justify a reversal, but when the errors are multitudinous, as they are in this case, a new trial ought to have been allowed. The power of dynamite as an explosive substance was not in issue. It was conceded that dynamite was an explosive substance, and that a dynamite bomb killed Degan. The jury knew that dynamite was an explosive substance. They knew it as well before the torn and bloody clothing was exhibited as they did afterward. Mark Antony could as pertinently say that he showed the rent

vesture of Cæsar to convince the people that daggers had the power to cut. The excuse fails; the purpose of the exhibition is too plain.

The counsel for the State were permitted to put leading questions to their own witnesses, notably to Gilmer, the most rickety witness of all. He swore that he saw the bomb thrown, and could recognize the man who threw it. A portrait of Schnaubelt was handed to him, and he was asked if that was the man. His answer was, "I say that is the man that threw the bomb out of the alley." The question was leading, for it lead the witness at once to the desired answer, yes. The offer of the picture by itself for identification was unfair. It should have been mixed with others and the witness required to select the portrait of Schnaubelt, without aid or suggestion from anybody. So he was permitted, in a theatrical way, to point out Spies as the man who lighted the fuse. This was all done after the style and manner of the minor theaters where the villain of the play is accidentally identified by a stranger who suddenly appears upon the scene. It is amazing that the Supreme Court allowed itself to be imposed upon by this bit of melodrama. Here is the way the scene is described in the written opinion:

"When shown a photograph of Schnaubelt, he said: 'I say that is the man that threw the bomb out of the alley.' When asked who the man was that came from the wagon towards the group referred to, and lighted the match, he pointed to the defendant Spies, and said, 'that is the man, right there.'"

This, if natural, would be impressive, but it was entirely mechanical and artificial. As the mummery of stage identification is rehearsed behind the scenes, so was this. The witness had rehearsed his part, and very likely had studied the picture. It had been shown to the witnesses for the State by the Assistant District Attorney, in his own office, and it is morally certain that it had been shown to Gilmer. So, as to Spies. Gilmer had seen the prisoners day after day, and knew them all. A performance which could impress a calm judicial body like the Supreme Court must have made a still greater impression on the jury.

It is shown by a chain of impartial circumstances that the testimony of Gilmer cannot possibly be true. He is contradicted by the positive testimony of a great many witnesses for the defense. He is contradicted by the negative testimony of witnesses for the prosecution. His testimony and theirs cannot be reconciled. His testimony is inconsistent with itself, and it is contradicted by inanimate witnesses that cannot lie,—the street, the alley, the houses in the neighborhood of the tragedy, the wagon, the pile of lum-

ber, and the stature of Schnaubelt. These all bear witness that the testimony of Gilmer is not true. It is impossible that the counsel for the State could have believed it at the close of the trial, though they may have believed it at the beginning. Notwithstanding its demonstrated falsity the testimony of Gilmer was played on the jury with great ingenuity. It was reinforced from Des Moines so that it might last until the rendition of the verdict. Its importance to the State was very great, for it was the only thread that connected any one of the defendants with the actual throwing of the bomb, and though it was weak as the thread of smoke that rises from the burning end of a cigar, it played an awful part in the doom of seven men. More than any other part of the secondary evidence, it controlled the jury; and although the Supreme Court evidently distrusted it, and even disbelieved it, the tremendous judgment of the court tries to rest upon it. Uneasy there, it throws the responsibility upon the jury, and seeks a foundation somewhere else. Here is the nervous expression of the Court:

"There is a mass of testimony in the record in reference to the statements made by Thompson and Gilmer. Some of this testimony sustains those statements and some of it discredits them. It is sufficient to say that it is very conflicting. It was the province of the jury to pass upon it. They had a right to consider it in connection with all the other facts and circumstances in the case. It is not necessary for us to pass any opinion upon it, as we think there is evidence enough in the record to sustain the finding of the jury independently of the testimony of Thompson and Gilmer."

In the presence of reasoning like that the imperilled citizen stands paralized and helpless. If it is not necessary to pass any opinion upon disputed testimony which influenced a jury to condemn seven men to death, than such a duty never can be necessary in any case. "Not necessary to pass any opinion!" Why, one thousand words of the decision is given to the testimony of Gilmer alone. And every word of the thousand is an expression of opinion. Every word of it is adverse to the defendants, and the benefit of every doubt is given to the State. In those thousand words, are these:

"Witnesses for the defense identified mostly with the International organization, and from whom the shots fired at the police *must have come*."

What is that but the expression of an opinion adverse to the witnesses who contradicted Gilmer? It is hardly a judicial expression either, for it shows feeling on the part of the Court. The genuine opinion of the Supreme Court that the testimony of Gilmer was worthless glimmers in the

concluding sentence, "There is enough to sustain the finding independently of the testimony given by Thompson and Gilmer."

THE PROVINCE OF THE JURY.

Whenever the evidence is weak, false, contradictory, improbable, or impossible, redress is denied on the ground that it was "the province of the jury" to act upon it in their own way. This testimony is important if true, reasons the Supreme Court, unimportant if false; there is enough without it.

In that very dangerous way, a jury manifestly unfriendly to the defendants is made sole critic of the evidence. It is in the appeal of the defendants that the jury itself was not "impartial," that it was a class jury, not fairly chosen from "the body of the county," that care was taken to select persons hostile to the accused even from the classes drawn upon, and that the State was allowed a greater number of challenges than the law intended; a number, which, whether legal or not, gave the prosecution an unfair advantage. Yet this jury is given absolute ownership of the evidence in the case, to use it at their own discretion for one side and against the other, even to the hanging of seven men. The Supreme Court abdicates its power to pass upon the character, quality, and sufficiency of evidence in the most important case ever tried in the State of Illinois. This in tiresome phraseology repeated over and over again.

"*The jury were warranted in believing* that the bomb was made by Lingg;" "*the jury were warranted in believing* that the Haymarket meeting was not intended to be peaceable;" "*the jury were warranted in believing* that the bomb was thrown and the shots fired as a part of the execution of the conspiracy;" "*it was for the jury to say* whether the evidence for the defense was more worthy of belief;" "*the jury had the right to look at it* in the light of the principles advocated by the international organization;" "*it was for the jury to say* how far that fatal result may have been brought about through the influence of the utterances put forth by the organs here designated;" *the jury were warranted in believing* that Parsons was associated with the man who threw the bomb;" "*it was for the jury to say* whether any others, than the members of that conspiracy had undertaken to make such weapons;" an so on, in monotonous formulary, page after page. A jury which the defendants allege was not impartial is made infallible judge of the legal and moral quality of all the evidence.

In selecting a jury to try the Anarchists the principle of impartiality was violated. The form of the statute may have been observed, but the spirit of the law was not. Whole classes of qualified persons were stricken from

the jury lists, or at least, they were not summoned in the case, which amounts to the same thing. Unfortunately these were what are known as the "working classes," the classes to which the defendants belonged, and of which, in part, they were supposed to be representative in socialistic and political opinions. These were disqualified for jurymen as effectually as if they had been disfranchised altogether. The whole machinery of legal administration was in the hands of the prosecution ; and a common bailiff, a subordinate part of that machinery, was made absolute dictator aud autocrat of a jury. The honest safeguard known as "drawing" for a jury was not observed. The equal chance which the "drawing" of jurors from a list of qualified voters gives to both sides was not given to the defendants. The jurors were not "drawn," but "summoned." They were summoned by a mere bailiff, man by man, at his own arbitrary will and pleasure. After he had strained and filtered the jury population of every man belonging to the same classes as the defendants, the prosecution was allowed to filter even his unfair selection by 120 peremptory challenges. Even of the twelve who tried the case, nine confessed themselves prejudiced against socialists, anarchists, and communists, while some of them even admitted that they were prejudiced against the defendants. Yet this is the jury "whose province it was" to pass upon all the evidence, and who were "warranted in believing" anything against the defendants. To hang men on the verdict of a jury thus chosen and impanneled will be a stain upon the jurisprudence of Illinois long after all the actors in the drama shall have passed away.

THE CASE OF DANIEL O'CONNELL.

In the O'Connell case the defendants were tried in Dublin for a conspiracy to overthrow the British Government in Ireland. They were all convicted and sentenced to fine and imprisonment. The judgment was reversed by the English House of Lords, on two grounds, one of which was that the jury had not been fairly selected, for that certain classes of jurymen had been omitted from the jury roll. The manner of doing it was this: The Recorder of Dublin had made out the jury lists as required by law, and had returned them to the Sheriff as his duty was. From the Sheriff's office, one list containing sixty names mysteriously disappeared. Of the defendants, seven were Roman Catholics, and by a curious coincidence it so happened that the missing list was a list of Roman Catholic jurymen, and by reason of its absence no Roman Catholic was placed upon the trial jury. In other words, men of the same religion as the defendants were excluded from the jury. The defendants challenged the array, but their challenge was over-

ruled for the reason that no fraud or misconduct was charged against the Sheriff, and for all that appeared, the missing list might have been lost by accident. The House of Lords reversed that ruling and decided that the injury and wrong to the defendants were the same whether the list was absent by accident or design.

It was in passing judgment in this case that Lord Chief Justice Denman used that remarkable sentence which has passed into our proverbial classics, "A mockery, a delusion, and a snare." What he said was this :

"If it is possible that such a practice as that which has taken place in the present instance should be allowed to pass without remedy, *trial by jury itself, instead of being a security to persons who are accused, will be a* MOCKERY, *a* DELUSION *and a* SNARE."

In regard to the Sheriff'sresponsibility for the loss of the jury list, Lord Denman said :

"The defendants have challenged the array on account of the fraudulent omission of sixty names from the list of jurors of the county of Dublin. It appears to me that that challenge ought to have been allowed. I think that the principle of challenge to the array is not confined to the narrow issue whether the Sheriff has done wrong, *but involves that larger question whether the party has haa the security of trial by a lawful jury of his country.*"

To allow a judgment to stand on a verdict rendered by such a jury, Lord Denman said—

"Would have the effect of securing success to the worst maneuvres, and of unsettling public confidence in the most important function of justice."

In the O'Connell case, only fine and imprisonment were involved, and yet the judgment was reversed because the jury list had been mutilated ; in other words, because all classes of qualified jurymen were not represented on sthe lstsifrom which the trial jury was drawn. In the Anarchist case, seven lives are involved, and the jury was obtained by worse maneuvres than the "worst maneuvres" employed in the trial of O'Connell. Although more than a thousand men were summoned, several wards of Chicago were absolutely excluded from representation on the lists from which the summonses were made. Whole classes of qualified jurors were denied a representation on the lists by the arbitrary decision of a common bailiff of the Court. If the judgment of death shall be permitted to stand in this case on

the verdict of a jury selected in that way, and from a jury list thus mutilated, then, indeed, has trial by jury, instead of being a security to persons who are accused, become "a MOCKERY, a DELUSION and a SNARE."

THE STATE TAKES ADVANTAGE OF ITS OWN WRONG.

In a light and playful way, Mr. Justice Mulkey, conceding errors in the record, talks irony to the condemned men, and says, "Really, so many of you were tried together, the "wonderment" is that the errors are not more numerous than they are. The exact language of Judge Mulkey is this:

"In view of the number of defendants on trial, the great length of time consumed in the trial, the vast amount of testimony offered and passed upon by the Court, and the almost numberless rulings the Court was required to make, the wonderment to me is the errors were not more numerous and of a more serious character than they are."

Thus wrong begets wrong, and the Supreme Court travels in a circle round and round. The joinder made errors, and errors are excused because of the joinder. In a "snare" like that seven men are to be strangled. The joinder of defendants at the trial was the act of the State's Attorney himself, yet he was permitted to take advantage of it, and multiply his challenges from twenty to one hundred and sixty. The Supreme Court excuses this by quoting the letter of the statute:

"The statute says that the attorney prosecuting on behalf of the people shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to. We cannot see how language can be plainer than that. It explains itself and requires no further remark."

Certainly language cannot be plainer than that, but the statute is to be construed, not according to its language alone, but according to its logically moral meaning, or as Blackstone has it, "according to the reason and spirit of the law." It never was the reason and spirit of the law that a prosecuting attorney should be allowed to multiply his own challenges at will by joining at his own pleasure a large number of defendants in one indictment, and then insisting upon it that they all be tried together. The statute means by "the accused" one defendant, and it recognizes in the prosecution only one accuser. The prosecution may multiply the number of defendants by joining them together in an indictment, but it cannot multiply itself by its own arbitrary act and will. Law, or not law, the allowance of

160 peremptory challenges to the prosecution was a "grievance and oppression." It was 160 challenges against each of the defendants, while they were allowed only 20 each against the State. It is very true that the prosecution used only about 60 of the peremptory challenges allowed them, while the defendants exhausted all of theirs, but this itself is evidence that the talesmen selected by the bailiff were favorable to the State and hostile to the defendants.

THE SPEECHES TO THE JURY.

The speeches to the jury were appeals for vengeance on the prisoners. They were anarchy in legal robes, vindictive and crimson as the speeches for which the defendants themselves were tried. The moral discipline of the bar was broken, and the ethics of the profession lowered when the State's Attorney condescended to pour angry invective and personal reproaches upon men powerless to reply. The dignity of the legal profession shriveled up when the counsel for the people offered fact-statements to the jury free from the guards and sanctions of an oath, and free from the test of cross-examination. Worse than all, the very genius of advocacy looked mendicant and ragged when the State's Attorney begged for a verdict on the niggling plea that the State had no appeal from acquittal, while from a judgment of guilty the defendants could appeal for a reversal to the Supreme Court, or to the Governor for a mitigation of the sentence. This was almost a promise that a death-sentence having served as an example and a warning, the death penalty would not be inflicted. "Gentlemen of the jury, their blood be upon us and upon our children, not upon you." It was illegal for the State's Attorney to absolve the jury from any portion of responsibility for the sentence of death.

There is a lofty and humane contrast to all that in a great state trial mentioned in the History of England; the trial of Ashton, Elliott and Lord Viscount Preston, for high treason, in the reign of William III. It is eloquently described in Macauley's fourth volume, and, although it has already been quoted in a Chicago periodical, it will bear repeating here.

"Early in January, Preston, Ashton and Elliott had been arraigned at the Old Bailey. They claimed the right of severing in their challenges. It was, therefore, necessary to try them seperately. A considerable number of judges appeared on the bench, and Holt presided. The Solicitor General, Somers, conducted the prosecutions with a moderation and humanity of which his predecessors had left him no example. 'I did never think,' he said, 'that it was the part of any who were of counsel for the King in cases of this nature to aggravate the crime of the prisoners, or to put false colors on

the evidence.' Holt's conduct was faultless. Pollexfen, an older man than Holt or Somers, retained a little—and a little was too much—of the tone of that bad school in which he had been bred. The prisoners themselves seem to have been surprised by the fairness and gentleness with which they were treated. 'I would not mislead the jury, I'll assure you,' said Holt to Preston, 'nor do you any manner of injury in the world.' 'No, my Lord,' said Preston, 'I see that your Lordship would not.' 'Whatever my fate may be,' said Ashton, 'I cannot but own that I have had a fair trial for my life.'"

Whatever their fate may be, the condemned Anarchists cannot say that they have had a fair trial for their lives. Their wives and children cannot say so; no friend of theirs can say so; and no enemy who has calmly studied the case. The plea for their death is that they are enemies of society, who may beneficially be destroyed. 'Anarchy is on trial," said the State's Attorney to the jury, and the verdict was responsive to the appeal. Vengeance is mine, says Populus, and I will repay. What matters it whether the seven are specifically guilty of the Haymarket affair or not? They are guilty of anarchy, and for anarchy they are condemned. For many months, remarks Populus, they have challenged me to play a game of murder, and I demand all the stakes I have won. There is force in this claim, and good barbarian logic. Had Populus exacted prompt payment through a vigilance committee, criticism would have been light and transient, but, having a choice of tribunals, Populus chose the court house, and is bound by the rules of the forum he selected. When he took his enemies before a jury he promised them a fair trial according to the laws of the land, and by that promise Populus is bound.

THE JURY REQUESTED TO RECONCILE THE INSTRUCTIONS OF THE COURT.

Not only did the jury have despotic power over the evidence, but they were made critics and reviewers of the trial court itself. It was assumed by the Supreme Court that the jury not only had knowledge and wisdom enough to separate good law from bad law, correct instructions from erroneous ones, but, also, that they actually made the separation and acted on the good law and the correct instructions only. On this, as on other points, the benefit of all doubt is given to the State. The proof of this is found in the decision itself. Here is the language of the Supreme Court, which assumes that the jury had legal knowledge greater than the trial judge, and in discriminating between the right and the wrong did whatever was proper to be done.

"As to the first objection, if we construed the instruction to mean what counsel claim it to mean, we would be forced to agree with them that it was erroneous. It is the duty of the jury to consider all the instructions together, and when this Court can see that an instruction in the series, *although not stating the law correctly*, is qualified by others, so that the jury were not likely to be misled, the error will be obviated."

In that paragraph is an assumption that the jury were competent to consider all the instructions together, and to strike out those "*not stating the law correctly*;" and it is also conclusively assumed that they did discriminate between the good instructions and the bad. Unfortunately, the sudden agreement on a verdict proves that the jury did not consider all the instructions together, but only those fringed with the sombre embroidery of death.

In another place the Supreme Court says this:

"Therefore, the instruction *fairly interpreted* means that the persons advised to commit murder were the working men belonging to and acting with the International group."

There again it is concluded beyond a reasonable doubt that the instruction was "*fairly interpreted*" by the jury, while the verdict and the swiftness of it are witnesses to the contrary.

Another important instruction of doubtful character the Supreme Court holds was made harmless, if not sound, by comparing it with healthier and more legitimate instructions. These "qualified" its meaning and disarmed it. In the language of the Supreme Court:

"The instruction is sufficiently *limited and qualified* when read in connection with all the other instructions to which it specially calls attention. It does not supersede and stand as a substitute for the other instructions given for both sides. It does not so purport upon its face. On the contrary, the jury are directed to carefully scrutinize such other instructions, and are told that their apparent inconsistencies will disappear under such scrutiny."

Is that good law in capital cases? Is it not the duty of the Court in trials involving life or death to purge the instructions of all "apparent inconsistencies," before giving them to the jury? If it is claimed that in a trial of eight men together on an indictment of sixty-nine counts, a trial lasting sixty days, the trial Court could not possibly scrutinize its numerous instructions so that they would not contain "apparent inconsistencies," how could twelve unlearned men "scrutinize" the same instructions and make the apparent inconsisten-

cies "disappear?" There are not twelve lawyers in Chicago learned and skillful enough to perform the feat which the Supreme Court assumes the jury actually performed. The Supreme Court itself is not able to do it. The "inconsistencies" are there; and no extent of scrutiny will make them "disappear." Besides, the evidence is clear that the jury did not attempt to "scrutinize" the instructions except in their most fatal meaning to the men on tiral. The Supreme Court continues thus:

"In the last sentence the jury are *requested* to disregard any unguarded expressions that may have *crept into* the instructions which may seem to assume the existence of any facts, and look only to the evidence, etc."

Why was it that the many creeping illegalities that got into the case were venomous towards the defendants? How came it that "unguarded expressions" *crept* into the instructions; expressions that assume the existence of facts?" They could not have *crept* in except by forgery. They were put in by the Judge. Having put them in, he politely "requested" the jury to disregard them. Where is the evidence that the jury did as requested? There is none, while the proof is abundant that they did not. It was unreasonable to expect that the jury would strike out unguarded expressions which assumed the existence of facts, after the judge himself had deliberately put them in, and why is it that in all this voluminous case no unguarded expressions "crept in" which assumed the existence of facts favorable to the accused? Why is it that the benefit of every doubt is given to the State, while the defendants must bear the evil consequences of every mistake made by the State's Attorney and the Judge? All these wrongs are not without a remedy, and that remedy lies in the moral nerve of the Governor of Illinois.

THE INVERTED LOGIC OF THE COURT.

Never before, except in burlesque, was the meaning of words reversed as in the Anarchist trial. Logic stood on its head, and reasoned with its heels. Facts absent from the theory of the prosecution were solemnly claimed as evidence to establish it. It was averred that *if* certain events had happened which did not happen, they would have shown that the conspiracy and the tragedy were cause and consequence, therefore the connection is proved. This is not meant for ridicule, and its grotesque appearance is merely the shadow of the Supreme Court tracing the crime back to the conspiracy. It is the language of the opinion itself that throws sarcasm upon the decision Here is the claim of the Supreme Court:

"The mode of attack as made corresponded with the mode of attack as planned."

And here is the inconsequent reasoning by which that claim is supported:

"The Desplaines street station was in sight of the speaker's wagon, and only a short distance south of it. *If* a bomb had been thrown into the station itself, and *if* the policemen had been shot down while coming out, a part of the conspiracy *would have been* literally executed just as it was agreed upon.

By reasoning upside down in that fashion the tragedy in the Haymarket is connected with a conspiracy that was *not* carried out, and seven men vaguely and remotely identified with said "conspiracy" are connected with a bomb thrown by "a person unknown," and who is not shown to have had any association whatever with the seven men, nor any connection at all with the so-called conspiracy. The Supreme Court itself virtually rejects the theory that Schnaubelt threw the bomb, for the more comprehensive drag-net theory that it was thrown by "some person to the jurors unknown."

The conspiracy which the prosecution attempted to show on the trial, and which it is pretended they did show, was not carried into execution in any of its essential details. As illustrated and explained by the Supreme Court itself, it was a conspiracy that aimed at a social and political revolution. Hundreds, aye, thousands of men were engaged in it. It was to begin by the throwing of bombs into the North Avenue station and into other stations in the city. Well drilled men, armed with rifles, were to be stationed outside to shoot the police as they came out; then the conspirators were to march inwards towards the heart of the city, destroying whatever should oppose them; the telegraph wires and the hose of the firemen were to be cut, and the reign of anarchy begin. Nothing of the kind occurred; nothing of it was attempted; nothing of it prepared for, except the making of bombs by Lingg.

According to the conspiracy relied on by the prosecution many men should have been engaged in it, and many bombs thrown. In fact only one bomb was thrown, and that by an unknown man. This disproves that conspiracy, and tends to show that the bomb-throwing was the revengeful ac of one man alone. There were no armed men with rifles anywhere, and the claim that pistols were fired by the mob is disputed by strong evidence. Every essential detail of the alleged conspiracy was absent from the tragedy,

and for want of the necessary facts a scaffold for seven men is built of "*if*" and "*would have been*."

"*If* a bomb had been thrown into the station, and *if* the policemen had been shot down while coming out, a part of the conspiracy *would have been* literally executed."

And therefore seven men must die for a conspiracy which was not executed, but which *would have been* executed *if* something which never happened had been done; a conspiracy, of which if it even existed, some of the condemned men could not possibly have had any knowledge. And thus the evidence in the case overwhelmingly proves that the mode of attack as made corresponded *not* with the mode of attack as planned.

Had the indictment been simply for a conspiracy punishable by fine and imprisonment, the prosecution would have been held down to clear and definite allegations with which the evidence would have been compelled to correspond. As it was, the heavier crime of murder was permitted to rest upon an undefined and shadowy charge composed of opposite and contradictory ingredients. The so-called conspiracy, instead of being a substantial accusation based on fact-averments on which issue might be taken, was nothing but a claim growing out of a mass of incoherent running testimony, and shifting day by day. The conspiracy was a remote cloud changing its form continually in obedience to the changing winds of evidence. One day it was like a weasel, the next it was backed like a camel, and at last it was "very like a whale."

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